**International Brotherhood of Painters and Allied Trades, District Council 9 *and* Apple Restoration and Waterproofing and Local 868, International Brotherhood of Teamsters, AFL–CIO.** Case 2–CD–866

April 25, 1994

## DECISION AND DETERMINATION OF DISPUTE

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

The charge in this Section 10(k) proceeding was filed by Apple Restoration and Waterproofing (Apple) alleging that the Respondent, International Brotherhood of Painters and Allied Trades, District Council 9 (District Council 9), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Apple to assign certain work to employees it represents rather than to employees represented by Local 868, International Brotherhood of Teamsters, AFL–CIO (Local 868). The hearing was held on September 20, 1993, before Hearing Officer Geoffrey Dunham. Thereafter, Apple and the Respondent filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

### I. JURISDICTION

Apple, a New York corporation whose place of business is in Brooklyn, New York, is engaged in the business of general exterior waterproofing and restoration work. During the year preceding the hearing, Apple purchased and received at its Brooklyn, New York facility goods, supplies, and services valued in excess of $50,000 directly from entities located outside the State of New York. We find that Apple is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.[1] The parties stipulated, and we find, that District Council 9 and Local 868 are labor organizations within the meaning of the Act.

### II. THE DISPUTE

#### A. *Background and Facts of Dispute*

Apple has no collective-bargaining agreement with any labor organization and is not a member of any employer association. Historical Restoration and Waterproofing Corp. (Historical) is party to a collective-bargaining agreement with Local 868. Local 868 represents the mechanics and laborers who work for Historical. On about June 11, 1993,[2] Apple entered into a contract with Helmsley-Spear, Inc., to perform certain waterproofing and restoration work at 200 Fifth Avenue and 1107 Broadway (collectively, the Toy Center). On about July 8, Apple subcontracted a portion of that work, primarily the waterproofing, to Historical. Apple retained the work of rigging the scaffolding at the jobsite and used its own unrepresented employees to perform that work. Historical commenced its work at the Toy Center in late July or early August.

On about August 9, Frank Marzillo, an agent of District Council 9, observed workers applying a tinted material to the exterior of the Toy Center. When Marzillo asked the workers who the employer was, the workers replied that it was a ''combination'' of Apple and Historical. On the same day, Marzillo met with Apple President John Weiss Sr. to claim the work of painting the exterior of the Toy Center. Weiss told Marzillo that the material being applied was a waterproof coating, not paint, and that the work belonged to Local 868. Marzillo responded that it was painters' work and that he did not recognize Local 868. Weiss responded that he would talk to Local 868 about the problem. Beginning on August 12, District Council 9 picketed the Toy Center jobsite. On August 13, Weiss, who represented both Apple and Historical, Marzillo, Local 868 President Moran, and William Nuchow, a Teamsters District Council arbitrator, held a meeting at which Marzillo took the position that anything with tint was District Council 9's work. Moran responded that it was Local 868 work and referred to literature regarding the Sonneborn Super Colorcoat product, the material that was being applied, which described it as a unique compound to enhance the waterproofing of heavy build coating. After the meeting and on the same day, Todd Noble, the architect and engineer for Helmsley-Spear, the owner of the Toy Center buildings, told Weiss that the waterproofing work would have to stop because of the picketing. As a result, the employees of both Apple and Historical had to cease their work at the jobsite. Apple filed the instant 8(b)(4)(D) charge on August 25, 1993.

[1] Although testimony was presented at the hearing as to whether Historical meets the Board's commerce standards for jurisdictional purposes, we find it unnecessary to decide this issue. In a 10(k) case, the Board need have jurisdiction only over an employer that is the object of a respondent union's unlawful conduct to satisfy the Board's jurisdictional requirements. See, e.g., *Plumbers Local 195 (Gulf Oil)*, 275 NLRB 484 (1985), and *Longshoremen ILA Local 1911 (Cargo Handlers)*, 236 NLRB 1439 (1978).

[2] All subsequent dates are in 1993 unless otherwise indicated.

B. *Work in Dispute*

The work in dispute is the application of pigmented material, and any power washing and caulking performed in preparation for such application, to the exterior of the Toy Center located at 200 Fifth Avenue and 1107 Broadway, New York, New York.

C. *Contentions of the Parties*

Apple contends that the disputed work should be awarded to employees represented by Local 868 on the basis of Historical's preference and past practice, economy and efficiency of operations, area practice, Historical's collective-bargaining agreement with Local 868, and the relative skills of the employees involved. Local 868 agrees with Apple's contentions.

District Council 9 argues that the work in dispute should be awarded to employees represented by it on the basis that all painting work, which it defines as the application of any tinted or pigmented material, including waterproofing material, falls within its jurisdiction as set forth in its charter.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of dispute pursuant to Section 10(k) of the Act, it must be established that reasonable cause exists to believe that Section 8(b)(4)(D) has been violated, and that the parties have no agreed-on method for the voluntary adjustment of the dispute.

Beginning on August 12, 1993, District Council 9 picketed the Toy Center jobsite after Weiss, Apple's president, refused to accede to its demands that Historical's employees represented by Local 868 be removed from the waterproofing work and replaced by employees represented by District Council 9.[3] The evidence, particularly District Council 9 business representative Marzillo's insistence that application of any tinted substance was District Council 9's work, reveals that an object of District Council 9's picketing was to force the assignment of the disputed work to employees represented by it rather than to employees represented by Local 868. In this connection, Weiss testified that at his first meeting with Marzillo on August 9 or 10, he told Marzillo that workers represented by Local 868 were applying the material and that Marzillo responded that it was painters' work, not Local 868 work.

Thus, we find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. No party contends that there is an agreed-on method for voluntary adjustment of the dispute within the meaning of Section 10(k) of the Act. Accordingly, we find that the dispute is properly before the Board for determination.

E. *Merits of the Dispute*

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

There is no claim that either Local 868 or District Council 9 has been certified by the Board to represent Historical's employees. Historical is party to a collective-bargaining agreement with Local 868 which is effective until July 31, 1995. Under that agreement, work performed by mechanics or laborers employed by Historical is within the jurisdiction of Local 868.[4] Historical has no collective-bargaining agreement with District Council 9. We find that the factor of collective-bargaining agreements favors awarding the disputed work to employees represented by Local 868.

2. Employer preference and past practice[5]

Weiss testified that when McGuire, Historical's president, authorized him to represent Historical in the

[3] Initially, we observe that although Apple, the Charging Party, does not directly employ the employees who are performing the disputed work, it is clear that District Council 9's picketing was aimed at Apple with an object of forcing Apple to assign or, through Apple, of forcing Historical to reassign the disputed work from Historical's employees to employees represented by it. As the Board stated in *Plumbers Local 195 (Gulf Oil)*, supra at 485:

> Section 8(b)(4)(D) makes it an unfair labor practice for a labor organization to engage in proscribed activity with an object of ''forcing or requiring *any employer* to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class'' . . . . The Board has interpreted this language as showing the ''clear intent of Congress to protect not only employers whose work is in dispute from such strike activity, but *any* employer against whom a union acts with such a purpose.'' [Emphasis in original; footnote omitted.]

[4] The contractual wage rates of this agreement include rates for ''Exterior Waterproofing Mechanic'' and ''Exterior Restoration & Waterproofing Journeymen.''

[5] Since Historical's employees are performing the disputed work, we find that it is the relevant employer here and thus we look to its preference and past practice in assigning the work. See *Operating Engineers Local 150 (Austin Co.)*, 296 NLRB 938, 942 fn. 21 (1989). In determining Historical's preference and past practice, we rely on Weiss' testimony in this regard both because he is Historical's authorized representative in this proceeding and because of his intimate knowledge of Historical's past business dealings. As to the former, Weiss testified without contradiction that Denise McGuire, Historical's president and Weiss' daughter, authorized Weiss to represent Historical both at the meetings with Marzillo and

meetings with Marzillo, McGuire told him that ''[i]t was 868's work and to stick with it.'' We find, therefore, that the factor of employer preference, while not determinative, favors the award of the disputed work to Local 868-represented employees. As to past practice, although Weiss testified that Historical has used Local 868-represented employees on past jobs, no evidence was presented as to whether a Sonneborn tinted color coating was used on those jobs and thus it is not clear whether the work on those jobs was similar to that in dispute here. We therefore find that this factor does not favor an award of the disputed work to either group of employees.

3. Area and industry practice

Local 868 asserts that its collective-bargaining agreements with other companies engaged in the exterior application of waterproofing materials support its claim for the work in dispute. In support of its assertion, Local 868 presented three agreements between Local 868 and other waterproofing companies. It is unclear from Local 868 President Moran's testimony, however, whether the agreements cover employees performing work similar to that in dispute here. We therefore find that this factor is inconclusive.

4. Relative skills

Weiss testified that the skills required for the work in dispute include not only the application of the waterproofing coat, but also the repointing and caulking of the building surface. Local 868-represented employees are qualified to perform the waterproofing work, including the repointing and caulking work. Marzillo testified that District Council 9-represented employees are qualified to perform all painting work, including the application of waterproofing material. This work includes caulking and power washing done in preparation for painting. Marzillo testified, however, that District Council 9-represented employees do not perform repointing work. We find that this factor tends to favor an award of the disputed work to employees represented by Local 868.

5. Economy and efficiency of operations

Weiss testified that it would be more efficient for Historical to assign the work to Local 868-represented employees because of their skill in the application of waterproofing as well as in other waterproofing techniques such as caulking, pointing, and roofing. The record establishes that there is no roofing work on this job and that District Council 9-represented employees are also skilled at the application of pigmented material and at caulking. As noted above, however, District Council 9-represented employees do not perform pointing work. Although the pointing work on the exterior of the Toy Center is not extensive, we find that this factor tends to favor an award of the disputed work to employees represented by Local 868.

Conclusion

After considering all the relevant factors, we conclude that employees represented by Local 868, International Brotherhood of Teamsters, AFL–CIO are entitled to perform the work in dispute. We reach this conclusion relying on the collective-bargaining agreement between Historical and Local 868, Historical's preference, relative skills, and economy and efficiency of operations.

In making this determination, we are awarding the work in dispute to Historical's employees represented by Local 868, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Historical Restoration and Waterproofing Corp. represented by Local 868, International Brotherhood of Teamsters, AFL–CIO are entitled to perform the application of tinted material, including any caulking and power washing performed in preparation for such application, to the exterior of the Toy Center located at 200 Fifth Avenue and 1107 Broadway, New York, New York.

2. International Brotherhood of Painters and Allied Trades, District Council 9 is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Apple Restoration and Waterproofing to assign the disputed work to employees represented by it.

3. Within 10 days from the date of this decision, District Council 9 of the International Brotherhood of Painters and Allied Trades shall notify the Regional Director for Region 2 in writing whether it will refrain from forcing Apple Restoration and Waterproofing, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.

in this proceeding. As to the latter, Weiss was Historical's president until November 1992 when he turned the business over to his children.